Supreme Court, U.S.
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No. 98-1008

In The

Supreme Court of the United States

October Term, 1998

EARL FOREMAN, et al.,

Petitioners,

vs.

AS MID-AMERICA, INC., A Corporation,

Respondent.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court held, in direct conflict with *Belknap v. Hale,* 463 U.S. 491 (1983), that Plaintiffs' breach of contract claims are preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 157 & 158 (1998), and in so doing, wrongly deprived Plaintiffs of their state law rights. App. 21-22. In defending the decision of the Nebraska Supreme Court, Defendant attempts to characterize Plaintiffs' claims as discrimination charges under the NLRA, but Plaintiffs' contract claims cannot be distinguished from those already held not preempted in *Belknap.* Plaintiffs' claims are simple, common-law breach of contract claims by non-union replacement workers, which are distinct from any possible National Labor Relations Board ("NLRB") claim, and as this Court held in *Belknap,* do not interfere with the jurisdiction of the NLRB and cannot be preempted. *Id.* at 509.

The Nebraska Supreme Court's preemption of Plaintiffs' third-party beneficiary contract claims under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1998), does nothing to promote the policies behind federal labor law preemption, but only serves to further deprive Plaintiffs of their state law rights. App. 26. Defendant argues that the issue of whether Plaintiffs' third-party beneficiary contract claims can be preempted by Section 301 of the LMRA is unremarkable. Yet, Defendant cannot cite any authority from this Court which discusses whether a non-union replacement worker's claims can be preempted by Section 301. The issue is one of first impression in this Court and should be decided in this case.

I. CONTRARY TO THE NEBRASKA SUPREME COURT'S DECISION, *BELKNAP* DICTATES THAT PLAINTIFFS' CLAIMS CANNOT BE PREEMPTED UNDER THE NATIONAL LABOR RELATIONS ACT.

A. PLAINTIFFS' CLAIMS ARE EVEN MORE "DEEPLY ROOTED IN LOCAL FEELING AND RESPONSIBILITY" THAN THE CLAIMS HELD NOT PREEMPTED IN *BELKNAP.*

Defendant cannot distinguish Plaintiffs' claims from those held not preempted in *Belknap.* 463 U.S. at 398. The only factual

distinction, as the Defendant boldly points out, is that the Plaintiffs in this case were not laid off as in *Belknap*, but were constructively discharged by the harassment they were forced to endure. The gist of Defendant's argument is that the claims in *Belknap* were based on the employer's breach of its contract of permanent employment, while the claims in this case are based not only on Defendant's breach of a contract of permanent employment, but on Defendant's breach of its contract to protect the replacement workers from harassment. Defendant argues that since it has not only breached its contract for permanent employment with Plaintiffs, but has also arguably committed an unfair labor practice, the case is distinguishable from *Belknap*, and Plaintiffs' claims therefore preempted.

As Justice Blackmun stated in *Belknap*: "If federal law recognizes that the employer voluntarily has undertaken an obligation to the replacements, the fact that the employer commits an unfair labor practice making it impossible for it to fulfill that obligation should not shield the employer from compensating the replacement employees." *Id.* at 522 (Blackmun, J., concurring).

In this case, Defendant chose to allow the Plaintiffs to be constructively discharged by union harassment rather than lay them off as in *Belknap*, in an attempt to avoid the very claims made by the Plaintiffs in this lawsuit and the very dilemma contemplated by this Court in *Belknap*. *See id.* at 502-505. Defendant now seeks to hide behind federal labor law preemption to avoid the consequences of its unsavory employment practices against innocent third parties, arguing that it should be allowed to do so because it not only broke its promises to the replacement employees, it arguably committed an unfair labor practice by allowing the union to harass the Plaintiffs. This Court expressly rejected that argument in *Belknap*, *id.* at 508 n.12, and should do so here as well.

Defendant's alleged factual distinction only serves to underscore that the actions taken against the permanent replacement workers by the Defendant in this case were even more egregious than those taken by the employer in *Belknap*, and thus Plaintiffs' claims even more "deeply rooted in local feeling and responsibility." *See Belknap, id.* at 498.

B. THE NEBRASKA SUPREME COURT'S DECISION IS IN DIRECT CONFLICT WITH *BELKNAP*.

The Nebraska Supreme Court ignored the principal holding of this Court's decision in *Belknap* when it failed to recognize that Plaintiffs' claims touch interests deeply rooted in local law and cannot be preempted by federal labor law. As this Court held in *Belknap*, whether or not the employer arguably committed an unfair labor practice is not the end of *Garmon* preemption analysis. 463 U.S. at 498, citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 238 (1959). *See also Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 751 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 1362 (1998). Yet the Nebraska Supreme Court ended its analysis when it found that "the focus of the state law breach of contract action and NLRB determinations would be the same – whether AS Mid-America acted or failed to act such that its replacement workers were subjected to harassment." App. 22.

In defending the Nebraska Supreme Court's decision, Defendant argues that the court correctly applied this Court's *Garmon* preemption doctrine to conclude that the NLRA preempts Plaintiffs' breach of contract claims. However, what Defendant and the Nebraska Supreme Court fail to recognize is that "*Garmon* preemption . . . is not absolute. A claim is not preempted under *Garmon* [even if the conduct in question is arguably an unfair labor practice,] if the regulated activity is (1) merely of peripheral concern to the federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility." *Cannon v. Edgar*, 33 F.3d 880, 884 (7th Cir. 1994) (citing *Belknap*, 463 U.S. at 498).

In *Belknap*, this Court allowed replacement workers to maintain state law breach of contract claims against a company which promised them permanent employment but then fired them to make room for returning strikers. 463 U.S. at 495-97. The employer's contention that the employees' breach of contract suit was preempted "because it related to . . . conduct that was part and parcel of an arguable unfair labor practice" was expressly rejected. *Id.* at 510. The Court

stated that even in the face of an explicit Board order directing an employer to violate contracts made with replacement workers, "the suit for damages for breach of contract could still be maintained without in any way prejudicing the jurisdiction of the board or the interest of the federal law in insuring the replacement of strikers." *Id.* at 512. As the Court noted,

> The dissent asserts that to subject the unfair labor practice employer to damages suits would cause intolerable confusion, but as we see it there would be no interference with the Board's authority to impose its remedy for violating the federal labor law. Performing that function neither requires nor suggests that the replacements must be deprived of their remedy for breach of contract.

Id. at 508 n.12. The Court pointed out that it has allowed state law claims deeply rooted in local law to go forward even when the actions complained of constituted unfair labor practices within the jurisdiction of the NLRB:

> In *Linn v. Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), we held that false and malicious statements in the course of a labor dispute were actionable under state law if injurious to reputation, even though such statements were in themselves unfair labor practices adjudicable by the Board. Likewise, in *Farmer v. Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), we held that the Act did not preempt a state action for intentionally inflicting emotional distress, even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice.

Id. at 509-10. *See also Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 197 (1978) (state court action for trespass allowed even though objectives of picketing arguably constituted an unfair labor practice charge).

Defendant speciously argues that *Sears* and *Farmer* are inapposite because the state court actions in those cases were not identical to claims which could have been brought before

the NLRB. Opp. at 16. However, in this case, as in *Sears* and *Farmer,* the Plaintiffs' state court breach of contract claims are not identical to discrimination charges under the NLRA. Just as the objectives of the picketing in *Sears* can be distinguished from the picketing itself, so can the objectives of Defendant's acquiescence in the harassment be distinguished from the fact that the harassment occurred.[1] For further discussion see *infra,* Section C.

This Court's principal holding in *Belknap* dictates that state law claims which are deeply rooted in local law should not be preempted by federal labor law. *Id.* at 509. As Defendant admits, only a *presumption* of federal preemption applies when the state regulates conduct arguably protected by federal law; this presumption properly admits to exception when unusually deep rooted local interests are at stake. Opp. at 16, citing *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54,* 468 U.S. 491, 502 (1984). The Nebraska Supreme Court's preemption of Plaintiffs' claims is in direct conflict with *Belknap*, which held that Plaintiffs' claims are deeply rooted in local feeling and responsibility and cannot be preempted.

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[1] Plaintiffs' allegations (contained in their claim for intentional infliction of emotional distress which is not at issue before this Court) concerning returning strikers being allowed to wear union T-shirts and bumper stickers are taken out of context by the Defendant, Opp. at 17, and do not constitute the basis for Plaintiffs' breach of contract claims. More importantly, *Escanaba Paper Co.,* 314 N.L.R.B. 732 (1994) does not hold that the wearing of union T-shirts and bumper stickers are absolutely protected rights. The Board held that the employer's ban on such union items violated the NLRA only because the employer in that case had no evidence that the wearing of union T-shirts and buttons affected discipline, safety or production in its plant. *Id.* at 735. The Board acknowledged that in other cases, it has upheld the employer's prohibition of such union symbols. *Id.* at 738. In any event, in *Sears,* this Court stated that "permitting state courts to evaluate the merits of an argument that certain . . . activity is protected does not create an unacceptable risk of interference with conduct which the Board . . . would find protected." 436 U.S. at 205.

The flaw in the Nebraska Supreme Court's analysis is further demonstrated by the inconsistency in its opinion. Plaintiffs pled, as an alternative cause of action to their breach of contract claims, an action for fraudulent misrepresentation based on the same promises (or misrepresentations) as the breach of contract claims.

If the Nebraska Supreme Court properly followed *Belknap*, as Defendant contends, then how could it find that Plaintiffs' claims for breach of contract are preempted, but their claims for misrepresentation, based on the same facts, are not?[2] If Defendant's breach of its promises to protect Plaintiffs from harassment are preempted because their focus is identical to possible NLRB claims, then how can Defendant's misrepresentations that Plaintiffs would be protected from harassment not be preempted as well?

The answer is clear. In concluding that Plaintiffs' breach of contract claims are preempted, the Nebraska Supreme Court ignored this Court's holding in *Belknap* and failed to make the final and critical inquiry that *Sears, Farmer* and *Belknap* established as an exception to the *Garmon* preemption doctrine. The issue is not simply whether the focus of Plaintiffs' breach of contract claims is the same as claims which could have been brought before the NLRB – the final and critical inquiry is whether Plaintiffs' claims touch state and local interests deeply rooted in local feeling and responsibility, which cannot be preempted by federal law.

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[2] The court contradicted itself by holding that Plaintiffs' breach of contract claims can be distinguished from *Belknap* and are preempted because their focus is identical to claims which could have been brought before the NLRB, while at the same time holding that the misrepresentation claims cannot be distinguished from *Belknap*, do not interfere with NLRB jurisdiction, and are not preempted. App. 22, 32.

C. THERE IS NO REALISTIC RISK OF INTERFERENCE WITH THE JURISDICTION OF THE NLRB

Plaintiffs' state law claims are not identical to any claim which could have been brought before the NLRB and do not create any realistic risk of interference with the jurisdiction of the Board. Plaintiffs do not "claim that AS Mid-America failed to protect them from the harassment and interference of their co-workers, which resulted from Plaintiffs' exercise of their Section 7 right not to participate in the strike."[3] Opp. at 10. Plaintiffs seek recovery for Defendant's breach of its contracts to provide permanent employment for as long as Plaintiffs' wanted and to protect them from harassment.

To recover for breach of contract under Nebraska law, Plaintiffs need only prove the existence of a promise, its breach, and damages.[4] *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 828, 496 N.W.2d 916 (1993). Plaintiffs need not prove that their right to refrain from union or concerted activities under the NLRA was infringed upon by their employer. In this case, the replacement workers' actions against their former employer concern whether Defendant breached its promises to protect them from harassment and provide them with permanent employment for as long as they wanted, not whether the objectives of their employer violated federal law.

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[3] *Newport News Shipbuilding & Dry Dock Co.*, 236 N.L.R.B. 1499 (1978) and *Brewton Fashions, Inc., a Division of Judy Bond*, 145 N.L.R.B. 99 (1963), *enf'd*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842 (1966), establish only that an employer's acquiescence in union harassment constitutes an unfair labor practice under Section 7 of the NLRA. That issue is irrelevant to Plaintiffs' state court breach of contract action. "This Court, and not the Board, reviews state-court lawsuits said to conflict with federal law." *Belknap*, 463 U.S. at 517 n.3 (Blackmun, J., concurring).

[4] In this lawsuit, Plaintiffs seek lost wages and future earnings. As Defendant admits, the NLRB is limited in its remedies to providing back pay and reinstatement. *See* 29 U.S.C. § 160 (1998).

Plaintiffs are all non-union employees who have never filed charges of discrimination with the National Labor Relations Board. Although Defendant characterizes Plaintiffs' claims as discrimination charges under the NLRA, Plaintiffs have never alleged that they were discriminated against nor do they allege any claims against the unions or their members. Defendant's assertion that these replacement workers arguably could have filed charges with the NLRB, is not only unrealistic, but irrelevant to this state court action against their employer. As stated by the Fifth Circuit Court of Appeals in *Branson*,

> To assert that such replacement workers must bring their claims to the NLRB rather than to an appropriate court, seems to vest this federal administrative body with power over disputes purely private and independent of an unfair labor practice or collective bargaining agreement. . . . Federal labor law may create in represented employees a certain expectation and interest that an employer will abide by terms properly and unilaterally implemented during negotiations over a collective bargaining agreement. Nevertheless, the expectations of replacement employees, who trust that an employer will keep its promises, stem from the different and more traditional source of state contract law.

126 F.3d at 752.

In *Belknap*, this Court could have chosen to couch the replacement workers' claims in terms of discrimination charges, but instead, allowed the replacement workers' breach of contract and misrepresentation claims to go forward without regard to whether they *could* have stated their claims to fall with the proscribed acts under the NLRA. 463 U.S. at 510. *See also Farmer*, 430 U.S. at 290; *Sears*, 436 U.S. at 197. The Nebraska Supreme Court clearly erred in preempting Plaintiffs' claims for breach of contract under the NLRA, contrary to Supreme Court precedent.

II. PLAINTIFFS' STATE LAW CLAIMS SHOULD NOT BE PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT

As non-union strike replacement workers, Plaintiffs were never parties to any collective bargaining agreement between Defendant and its unions. In fact, "an inherent conflict exists between the union's role as bargaining agent for the strikers and the interests of the striker replacements. This is not a conflict that might *sometimes* occur. It is a conflict which will *inevitably* occur. . . . " Jeremy P. Sherman, *Bargaining Over The Terms And Conditions For Striker Replacements: Is The NLRB About To Change The Rules?*, 47 Labor Law Journal 178, 179 (March 1996). It is that very conflict which not only prevents the employment of strike replacement workers from being the subject of a collective bargaining agreement, but makes it impossible for strike replacement workers to file a grievance with the union, and should exclude Plaintiffs' claims from preemption under Section 301 of the LMRA.

In *Allis-Chalmers v. Lueck*, 471 U.S 202, 213 (1985) and in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988), this Court emphasized that § 301 cannot be read broadly to preempt nonnegotiable rights conferred on individual employees as a matter of state law. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994). *Belknap* establishes that Plaintiffs' strike replacement worker claims for breach of contract and mispreresentation are of only "peripheral concern" to federal labor law and that permitting these actions will not "frustrate any policy of the federal labor laws." *Belknap*, 463 U.S. at 509-12.

This Court has not yet decided the issue of whether Section 301 can be read broadly enough to preempt claims brought by non-union replacement workers, who clearly stand outside the collective bargaining process. The only federal courts which have addressed the issue have come to opposite conclusions. *See cases cited in* Pet. at 22. In this case, after Defendant removed Plaintiffs' causes of action for third-party beneficiary contract rights, the federal district court remanded the cases back to state court on Plaintiffs' motions, finding

the claims were not "completely preempted" under Section 301.

This Court has already held that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by 301 or other provisions of the federal labor law." *Lueck*, 471 U.S. at 211. Other federal courts have allowed non-union plaintiffs to bring state law claims enforcing third-party beneficiary rights under collective bargaining agreements, reasoning that the policies behind federal labor law preemption do not apply to non-union plaintiffs. *See cases cited in* Pet. at 26.

Preempting Plaintiffs' non-union replacement workers' claims under Section 301 in this case will not promote collective bargaining nor preserve the effectiveness of arbitration.[5] As such, this Court should grant certiorari to decide that Plaintiffs' claims survive preemption under Section 301.

CONCLUSION

For the foregoing reasons, as well as those stated in their Petition For Writ Of Certiorari, Petitioners respectfully request that this Court grant certiorari to reverse the Nebraska Supreme Court's erroneous preemption of their claims, and restore their state law rights.

Respectfully submitted,

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[5] Defendant's argument that Plaintiffs' third-party beneficiary claims would impact the enforceability of arbitration procedures is irrelevant, *see* Opp. at 24, given the finding that Plaintiffs were told by management to report any harassment directly to their supervisors. App. 9-10.